No. 93-1636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. CONTRARY TO THE RESPONDENTS' POSITION, THE SHERIFF NEED NOT BE SUBJECT TO THE CONTROL AND SUPERVISION OF THE COUNTY COMMISSION IN ORDER TO BE A FINAL POLICYMAKER FOR THE COUNTY.

The primary argument of the respondents is that a sheriff is not a policymaker for the county because his or her power is not governed by the people who sit on the County Commission, and because he or she is not subject to the control and supervision of those people. As the respondents state it:

[T]he Sheriff does not speak for the County in the area of

> law enforcement, because his authority over law enforcement does not emanate *from the County Commission* and cannot be withdrawn *by the County Commission. . . . County Commissions have no authority* over sheriffs' law enforcement activities. Nor are they authorized under state law to have any policies *of their own* in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he authorized the drug raids at issue here.

Respondents' Brief 9 (emphasis added). *See also*, resp. br. 14 (because "county commissions in no way control the activities of sheriffs," therefore "a sheriff is not even an agent of the county -- let alone a policymaker"); 21 (issue is whether "the Chambers County Commission is liable for policies created by the incumbent in an office that it did not create and cannot control"); 28 (contending that petitioners "seek to hold the Chambers County Commission strictly liable for the acts of an official over whom it has no control"); 31 (municipal liability does not exist for officials who are "no longer controlled by the municipal legislative body"); 32 (suggesting an official is a municipal policymaker only where the power exercised by the official "would . . . be subject to revocation or modification by the city council").

The respondents appear to frame the issue as whether the individual county commissioners should be liable for their failure to control the sheriff. But that is not the issue decided by the Eleventh Circuit, nor is it the issue before this Court. Instead, the question is whether, as the Eleventh Circuit stated, the sheriff "is the final law enforcement decisionmaker for Chambers County." Pet. App. 34a. Elected executive officials often set governmental policy in areas in which they are subject to no legislative control or review. Just as a governor can set

statewide executive policy on certain matters for which the state legislature has no oversight, or a mayor can set citywide policy on certain matters for which the city council has no oversight, a sheriff or a county tax assessor or a county coroner can set countywide policy on certain matters for which the county commission has no oversight.[1]

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[1] In this case, the county itself was not named as a defendant, although the county commission was. However, it is clear from the opinions of both the Eleventh Circuit and the district court that county liability (as opposed to liability of the individual county commissioners) for the actions of the sheriff is not dependent upon naming the county as a defendant per se. Instead, both courts reviewed the issue of county liability for the actions of the sheriff without any concern for the fact that the county itself was not named as a defendant. Pet. App. 31a-34a, *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1449-1451 (11th Cir. 1993); Pet. App. 67a. Thus, it is apparent that naming as a defendant the county commission, which controls the funds to pay any judgment, is sufficient to raise the issue of the liability of the county itself for the sheriff's actions. The Eleventh Circuit has suggested as much not only in this case, but in others. *See, e.g., Bailey v. Board of Commissioners of Alachua County*, 956 F.2d 1112, 1125 (11th Cir. 1992) (Court reviews county's liability for actions of certain jail officials even though county was not named as a defendant, but county commission was). Indeed, the respondents in the present case have never argued otherwise -- not in the district court, the court of appeals, or in this Court -- and have never contended that the county must be named as a defendant in order to obtain county liability for actions of county officials other than the county commissioners themselves. Rather, as the respondents noted, the issue in this case is the correctness of the Eleventh Circuit's ruling -- as described by the respondents -- "that Sheriff Morgan's law enforcement decisions could not form the basis of a section 1983 action against Chambers County." Resp. br. 12. In addition, the complaint in this case named the sheriff as a defendant in both his individual and official capacities, and the Eleventh Circuit has held that the latter may be sufficient as a means for attaching county liability for the actions of the sheriff if he or she is a final county policymaker. *Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989) (suggesting that a claim against the sheriff in his or her official capacity "may be against [the sheriff] as representative of the county" in cases in which the county itself is not sued directly).

For example, in Alabama the county tax assessor is elected by the county's voters and "in each of the several counties shall have the right and authority to assess all real estate." Ala. Code § 40-7-1. The "coroner for each county" is elected by the county's voters and is discharged with "the general duty . . . to hold inquests." Ala. Code, §§ 11-5-1, 11-5-4. These functions are not supervised by the county commission. However, if a county tax assessor were to adopt an intentionally racially discriminatory policy of assessing taxes, or a coroner were to adopt a policy of refusing inquests for persons of a certain religious view, those unconstitutional policies could certainly be considered county policies even though the county commission has no oversight. This simply recognizes the fact that governmental power is not given exclusively to legislative bodies, and that in some areas, elected executive officials speak for the government rather than legislative officials.

Thus, respondents are wrong to suggest, as they do, that local governments are operated according to the typical corporate business model. According to the respondents, this Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), adopted some sort of view of local government as being identical to corporate business government. Resp. br. at 19-22. The respondents specifically contend:

> [A]ccepting petitioners' argument . . . would require the Court to abandon [the] conception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy.

Resp. br. at 21-22.

This implies that, for purposes of 42 U.S.C. § 1983, only legislative bodies can make final policy for local governments. It ignores the fact that most governments operate differently than the typical business corporation. Most governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others. This Court has never said that governmental functions should be viewed through a corporate business model or that legislative officials are the only officials who can ever set governmental policy for purposes of § 1983.

To the contrary, in analyzing § 1983, this Court specifically has recognized that government officials other than legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. New York City Dept. of Social Services, 436 U.S. at 694 (emphasis added).

> [In § 1983 cases], the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority for the local government[]. . . .

Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). By noting in *Monell* that local officials other than "lawmakers" can make policy, and in *Jett* that officials other than "governmental bodies" can make policy, this Court clearly

has rejected the notion that policy can be made only by legislative bodies. Also, while the respondents are correct in noting that *Monell* requires a causal connection between the actions of the policymaker and the constitutional injury, resp. br. at 23-26, *Monell* also makes it clear -- as just noted -- that the policymaker can be someone other than a lawmaker and the causation need not stem from the legislative body.

Moreover, the specific portion of *Monell* which the respondents cite to support their corporate governance argument actually proves the contrary. The relevant point comes from *Monell's* discussion of the Dictionary Act, passed in 1871 shortly before the passage of what is now § 1983. Resp. br. at 19, *citing*, *Monell*, 436 U.S. at 688. As this Court stated in *Monell*, the Dictionary Act's definition of the word "person," by encompassing local governments and corporations, demonstrated that the later use of the word "person" in what is now § 1983 was also meant to include local governments. 436 U.S. at 688-689. However, contrary to the respondents' suggestion at pages 19-22 of their brief, this does not mean that municipalities operate with the same governing structure as typical business corporations. Instead, the Dictionary Act specifically drew a distinction between local governments and business corporations, stating "the word 'person' may extend and be applied to bodies politic *and* corporate." Act of Feb. 25, 1871, § 2, 16 Stat. 431, *quoted in Monell*, 436 U.S. at 688 (emphasis added). Thus, nothing in the Dictionary Act or in *Monell* supports the respondents' contention that a local governmental structure must be viewed identically to a typical corporate business structure.

There is another sense in which the respondents are wrong to contend that municipal liability does not exist for those executive officials, such as sheriffs, who never were or "are no longer controlled by the municipal legislative body." Resp. br.

at 31. Oversight or control by the county legislative body might tend to demonstrate that the sheriff does not exercise what Justice O'Connor's plurality opinion in *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988) has called "*final* policymaking authority." *Id.* at 123 (emphasis added), *quoting*, *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). Both *Prapotnik* and *Pembaur* make it clear that *final* policymaking authority by a local official is a prerequisite to local governmental liability for his or her actions, and if the official's authority is subject to review or control by others, it may not be final. Justice O'Connor's opinion in *Prapotnik* explained:

> [A]s the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S. at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision *is subject to review* by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

485 U.S. at 127 (first and third emphases in original; second emphasis added).

Because, on the one hand, the respondents contend that an official must be under the "control" of the local legislative body in order to set local governmental policy, and because, on the other hand, *Prapotnik* and *Pembaur* make it clear that control by the legislative body may well demonstrate the subordinate official is not a *final* policymaker, the respondents' formulation would likely mean that local governmental liability attaches *only* for the actions of the members of the government's legislative body. But that is simply not the law. As noted

previously, this Court in *Monell* and *Jett* made it clear that officials other than legislators can be final policymakers for local government.

Also, in *Pembaur*, this Court held that county liability existed for the law enforcement actions of two executive officials -- the sheriff and the county prosecutor -- even though there was nothing to suggest that the county governing board had oversight or control of these Ohio county officials in the arena of law enforcement or had delegated authority to them. 475 U.S. at 476, 484-485. In fact, under Ohio law, the only area in which the county commissioners direct and control the sheriff is in the sheriff's charge of courthouse, but in terms of law enforcement and keeping the peace, the sheriff is subject to no such control. Ohio Rev. Code Ann. § 311.07(A).

The federal district court in *Pembaur* initially dismissed the county as a defendant by adopting the same rationale proffered by the respondents here -- that the "Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." 475 U.S. at 475 (quoting the district court). However, as this Court explained, the Sixth Circuit Court of Appeals reversed on that point, holding "that the County Board's lack of control over the Sheriff would not preclude county liability if 'the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.'" *Id.* at 475, *quoting, Pembaur v. Cincinnati*, 746 F.2d 337, 340-341 (6th Cir. 1984). This Court never questioned the Court of Appeals' reasoning in this respect, and instead affirmed the Court of Appeals' conclusion that the sheriff did establish final policy for the county in the area of law enforcement. 475 U.S. at 476, 484-485. Obviously, if the "control" rationale advocated by the district court in *Pembaur* and the respondents in the

present case were the proper means of analysis, the result in *Pembaur* would have been very different.

The question, then, is not whether the county commission has oversight or control over the sheriff in matters of law enforcement. The question is whether the sheriff makes law enforcement policy for the county, or for some other entity, such as the state. This is discussed in the next section of this reply brief.

II. ALABAMA LAW INDICATES THAT THE SHERIFF EXERCISES POLICYMAKING AUTHORITY ON BEHALF OF THE COUNTY RATHER THAN THE STATE.

The respondents correctly state that this case involves the question of whether the sheriff "is properly treated as a state policymaker or a county policymaker." Resp. br. 19. In arguing the former rather than the latter, they point first to the fact that, under state law, Alabama sheriffs are considered officers of the state rather than employees of the county. Resp. br. 14. But they also note, as did the Court of Appeals in this case, that this label does not answer the question of whether the sheriff sets policy for the county in the area of law enforcement. *Id., citing*, Pet. App. 33a (5 F.3d at 1450). *See also, Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (the sheriff's "functional role . . . is more significant than his technical status as an employee of the state").

The respondents then contend that because law enforcement duties are assigned directly to the sheriff and not to other officials who operate locally or to the county commission, the sheriff does not carry out any sort of county policy in the area of law enforcement. Resp. br. 14-16. This point was discussed at pages 14-15 and pages 23-26 of the

petitioners' opening brief, and the county commission point was discussed in part I of this reply brief, and those discussions will not be repeated here.

Going beyond the points made by the Court of Appeals, the respondents also cite Ala. Code § 36-22-5 for their contention that the sheriff sets policy for the state. Resp. br. 16. That statute, which is quoted in full in pet. app. 75a-76a, reads in part as follows:

> The sheriffs *in their respective counties*, whenever directed to do so in writing by the district attorney or by the attorney general or governor, shall make special investigation of any alleged violation of the law *in their counties* and shall prepare a written report setting forth what information has been obtained . . . .

(Emphasis added). Also, the respondents cite Ala. Const. Art. V, § 121 allowing the Governor to require written information from various officials, including sheriffs. Resp. br. 16. The fact that the duties of sheriffs include responding to investigatory requests of state officials such as the attorney general or governor does not demonstrate that the sheriff makes policy for the state, particularly when a sheriff's duties in this respect are limited to his or her individual county, and when this is only a small part of the sheriff's overall duties. Moroever, the costs of such a special investigation are to be paid "from the county treasury" based upon a detailed sworn statement which the sheriff "shall file with the county commission" and which the county commission shall audit and reduce if appropriate. Ala. Code § 36-22-6, pet. app. 76a.

Much more important to the issue at hand than the sheriff's limited duty to respond to special investigative requests is the general description under Alabama law that "[i]t shall be the

duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* . . . ." Ala. Code § 36-22-3(4) (emphasis added), pet. app. 75a. This broad description of a sheriff's law enforcement duties, subject to the control of no one but limited only to the sheriff's county, demonstrates the sheriff is a county rather than a state policymaker.

Next, the respondents cite the involvement of state officials in impeachment proceedings against sheriffs. Resp. br. 16. Of course, impeachment is a very rare event. *See, Parker v. Amerson*, 519 So.2d 442, 444 n.1 (Ala. 1987) (citing only three cases dealing with impeachment of sheriffs). Much more relevant is the identity of those persons who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily -- the voters of each county. Ala. Const. Art. V, § 138, pet. app. 74a. The role of the voters of the county is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those extremely infrequent occasions when impeachment is attempted. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office"). This strongly demonstrates that the sheriff sets policy for the county and its citizens rather than for state officials.

Also, the respondents mention Ala. Code § 36-21-46, requiring certain qualifications for law enforcement officers in the state, including those employed by sheriffs -- but not requiring those qualifications for sheriffs themselves. Resp. br. 16. However, a state statute setting qualifications for people who work in a local law enforcement office does not mean the

head of the office -- in this case, the sheriff -- sets policy for the state. For example, the statute cited by the respondents also governs officers employed by city police chiefs and county constables, but it does not mean that chiefs and constables set statewide law enforcement policy.

Thus, nothing cited by the Eleventh Circuit or the respondents in this case leads to the conclusion that a sheriff sets law enforcement policy for the state, as opposed to the particular county.

Moreover, although the sheriff's law enforcement duties are not controlled by the county commission, there is a sense in which he or she works with the county commission and must abide by commission decisions, particularly in terms of financing the law enforcement effort of the sheriff. The county commission is charged with providing all of the sheriff's office, equiptment, and operations expenses, "as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." Ala. Code § 36-22-18, pet. app. 77a-78a. Because this duty falls on the commission, presumably the commission makes the decision as to the level of funding "reasonably needed" and provides the sheriff with that specific amount. The commission also determines whether various monies from fees, commissions, or costs may be retained by the sheriff or instead paid into the general fund of the county. Ala. Code § 36-22-17, pet. app. 77a. Thus, while the commission does not control the sheriff's law enforcement activities, it is intimately involved with and makes decisions about an important part of those activities -- the funding of them. This demonstrates that the sheriff's law enforcement activities are tied much more to the local level than the state level, indicating that the sheriff is a county policymaker rather than a state policymaker.

Finally, the respondents concede that "Sheriffs in Alabama

do have a substantial degree of policymaking authority in the area of law enforcement." Resp. br. 15. But they fail to explain how each of the 67 sheriffs in Alabama's 67 counties can be said to make law enforcement policy *for the state*. For example, while the Sheriff of Chambers County may have adopted a policy of permitting the type of raids that occurred in this case -- with an entire nightclub of people held at gunpoint for 90 minutes because of one drug sale in the club, pet. app. 4a-7a, 5 F.3d at 1439-1440 -- the sheriff of a neighboring county may have adopted an opposite policy. Which is the policy of the State of Alabama? The answer is that neither sheriff can set statewide law enforcement policy, particularly given that the operations of each is limited to his or her specific county. Instead, the sheriff sets policy in and for the county.

III. THE ELEVENTH CIRCUIT'S HOLDING IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISION IN *PEMBAUR v. CINCINNATI.*

With respect to *Pembaur v. Cincinnati*, respondents are correct when they state that this Court deferred to and adopted the Sixth Circuit's ruling on the point of county liability for the actions of the sheriff. Resp. br. 30. But *Pembaur* is nevertheless important, and its result is controlling in this case absent some important distinction between the situation there and the situation in Alabama in the present case.

As pointed out in Part I of this brief, the federal district court in *Pembaur* dismissed the county on the same reasoning proffered by the respondents in the present case, but the Sixth Court of Appeals reversed and this Court did not question that ruling. Moreover, it is quite inconsistent for the Eleventh Circuit in the present case to ignore this Court's adoption of the Sixth Circuit's reasoning in *Pembaur* and come out with a completely different result from that of the Sixth Circuit and

this Court when the relevant factors are identical. (The similarities between the facts in *Pembaur* and the present case are discussed more fully in pages 12-17 of petitioners' opening brief).

Indeed, the respondents here seem to concede that this Court and the Sixth Circuit were correct in holding that Ohio sheriffs are county policymakers in the area of law enforcement. As the respondents admit, "Ohio law . . . plainly treats sheriffs as county officials." Resp. br. at 30. Yet the respondents try to justify the Eleventh Circuit's ruling in the present case by alleging various distinctions between Ohio and Alabama law.

The points of Ohio law which the respondents contend are different from Alabama are set out at page 30, note 23 of their brief. The first -- that the office of sheriff has occasionally been described in Ohio case law as a county office -- is no different from Alabama. *See, e.g., Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1974) ("the sheriff of Jefferson County is undoubtedly a county officer"); *In re County Officers*, 143 So. 345 (Ala. 1932) (sheriffs are "strictly speaking, county officers" for purposes of 1912 constitutional amendment regarding salaries); *State ex rel. Martin v. Pratt*, 68 So. 255, 257 (Ala. 1915) ("a sheriff [is] the highest purely executive officer of a county"). Alabama law specifically confers upon sheriffs the duty to enforce the law "in their respective counties." Ala. Code, § 36-22-3(4). Moreover, as the Eleventh Circuit noted in the present case, any characterization of an Alabama sheriff as a state official rather than a county official is not controlling with respect to the issue at hand. Pet. App. 32a-33a, 5 F.3d at 1450.

The other points cited by the respondents, quite noticeably, are not the same points upon which the Sixth Circuit relied in *Pembaur* in holding that Ohio sheriffs set county law

enforcement policy. As explained at pages 12-13 of the petitioner's opening brief, the points considered relevant by the Sixth Circuit are the same in Alabama as in Ohio.

Instead, the respondents cite a number of other points. For example, they contend that Ohio's "counties are recognized as having law enforcement power," citing an Ohio Attorney General's opinion which they state allows "counties [to] join with towns to coordinate regional law enforcement efforts." Resp. br. 30 n.23, citing Op. Ohio Att'y Gen. 90-091. Actually, the Attorney General's opinion cited by the respondents simply states that, because county sheriffs have jurisdiction throughout their county -- including towns within the county -- the sheriffs may participate with municipal police departments in the county in creating a metropolitan narcotics unit and a joint crime lab. Of course, in Alabama, sheriffs also have jurisdiction throughout their counties, including towns within the counties, although we are aware of no decisions one way or the other regarding the creation of metropolitan narcotics units or crime labs within Alabama counties. However, this in no way suggests that Ohio sheriffs have closer policymaking ties to their counties than Alabama sheriffs, or that Alabama sheriffs have greater ties to statewide policy than Ohio sheriffs.

Next, the respondents cite the fact that Ohio law permits home rule and that chartered counties in Ohio may change the office of sheriff from an elected to an appointed one. Resp. br. 30 n.23. Of course, the Sixth Circuit's decision in *Pembaur*, as affirmed by this Court, relied upon Ohio law to the effect that sheriffs in Ohio generally are elected by the county's voters. 746 F.2d at 341. The fact that home rule may exist in some Ohio counties, and that chartered Ohio counties may change from election to appointment, does not seem to be of much importance in concluding that an Ohio sheriff makes county policy -- and certainly does not demonstrate, by contrast, that an

Alabama sheriff makes statewide rather than county policy. Indeed, if those were key distinctions, only Ohio sheriffs in home rule and chartered counties would be considered county policymakers and the rest would be considered state policymakers.

The respondents contend that "[i]n some instances," Ohio county boards fill sheriffs' vacancies. Resp. br. 30 n.23, *citing*, Ohio Rev. Code Ann. § 305.02. Actually, that statute provides that vacancies are filled by the county central committee of the political party which last held the office, unless the officeholder was an independent, in which case the county board fills the vacancy. Finally, the respondents cite an Ohio statute specifying that county boards review annual statements of various officers, including sheriffs. Resp. br. 30 n.23, *citing*, Ohio Rev. Code Ann. § 305.19. Of course, in Alabama, the sheriff is also required to file certain reports -- specifically, financial reports -- with the County Treasurer and with the County Commission. Ala. Code §§ 36-22-3(3), 36-22-6, pet. app. 74a-76a. Again, these distinctions -- if they are, in fact, distinctions -- do not prove that Ohio sheriffs set county policy while Alabama sheriffs set statewide policy.

In summary, none of the points cited by the respondents seem to distinguish, in any important way, sheriffs in Alabama from sheriffs in Ohio in terms of whether they make policy for the county or the state. Given the respondents' concession that "Ohio law . . . plainly treats sheriffs as county officials," resp. br. 30, it follows that Alabama sheriffs also make policy for the county in the area of law enforcement.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

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